The Probater

Hull & Hull LLP

VOLUME 27, NUMBER 3, SEPTEMBER 2021

Calmusky v Calmusky and Mak (Estate) v Mak: What is the Status of Beneficiary Designations and the Presumption of Resulting Trust in Ontario?

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Many of you may be familiar with the decision of *Calmusky v Calmusky*, 2020 ONSC 1506, as it caused quite a stir in the estate planning and estate litigation world last year. In that decision, the court considered a RIF designation, and whether the presumption of resulting trust applied to that designation. The outcome was controversial, and has been the subject of much discussion in the last year and a half.

The Presumption of Resulting Trust

The presumption of resulting trust is applicable to *inter vivos* gratuitous transfers from a parent to an adult child. Where the presumption is applied, the recipient of the transfer must prove that the parent intended the transfer to be a gift, otherwise it will be presumed that the recipient child was holding the property in trust for the parent.

The presumption of advancement has the opposite outcome, presuming that the donor intended to gift the property to the donee. This presumption remains applicable to transfers from a parent to a minor child.

The leading case in respect of the presumption of resulting trust is the Supreme Court of Canada decision in *Pecore v Pecore*, 2007 SCC 17, which dealt with joint bank accounts between a parent and a child.

The Decision in *Calmusky* and the Aftermath

The court in *Calmusky* applied *Pecore* when considering the RIF designation, which named one of the deceased's two surviving sons as beneficiary, and determined that the presumption of resulting trust applied to the designation. On that basis, the son designated as beneficiary had the onus of proving, on a balance of probabilities, that his father intended the beneficiary designation to be a gift to him. The court ultimately concluded that the son did not satisfy his onus in this regard. As a result, the proceeds of the RIF were considered to be part of the deceased's estate.

This outcome raised a number of concerns, including the following:

- There is legislation that appears to conflict with the decision.
- There are policy concerns surrounding what additional steps a testator may have to take to ensure that his or her beneficiary designations are upheld, with some options in this regard (*i.e.*, including the beneficiary designation in a Will) opening the door to the possibility of paying Estate Administration Tax on the value of the funds for which a beneficiary was designated, and which otherwise would have passed outside of the estate.
- Where testators have previously made beneficiary designations and are no longer able to make new ones or supplement those designations with additional documentation of their intentions, their testamentary intentions may not be upheld.
- There may be an increase in estate litigation.

Unlike an *inter vivos* gift, which the recipient is typically aware of receiving, the beneficiary of a RRIF, insurance policy, or other similar instrument, may not know that they are named as a beneficiary until after the testator dies. Despite this, the court in *Calmusky* stated, quoting in part from *Pecore*, that "it makes sense from a policy perspective that the evidentiary burden be on the … designated RIF beneficiary, since the … RIF beneficiary 'is better placed to bring evidence of the circumstances of the transfer'".

Placing the onus on the recipient to establish that the testator intended to gift the asset to them is

troubling. They may not, in fact, be "better placed" to bring evidence of the circumstances of the designation, or the testator's intention in doing so, as they may not have even been aware of the designation. Placing the evidentiary burden on the recipient may result in outcomes that are not consistent with the testator's intentions.

Unfortunately, as *Calmusky* was not appealed, estate practitioners were left wondering how this decision may be applied in the future, and how their practice, and clients, could be impacted.

Has *Calmusky* Been Followed?

More recently, an Ontario Superior Court of Justice decision again considered the question of whether a beneficiary designation should be subject to the presumption of resulting trust. In *Mak (Estate) v Mak*, 2021 ONSC 4415, released in June of 2021, similar to the facts in *Calmusky*, one of the deceased's four sons was named as the beneficiary of her RRIF.

In this decision, the court specifically declined to apply the court's reasoning in *Calmusky*, noting that there is good reason to doubt the conclusion that the doctrine of resulting trust applies to a beneficiary designation. The court clarified that the presumption of resulting trust, as addressed in *Pecore*, applies to *inter vivos* gifts. A beneficiary designation, on the other hand, is akin to a testamentary disposition, as it does not take effect until the testator's death. As noted by the court in *Mak Estate*, "[t]he whole point of a beneficiary designation … is to specifically state what is to happen to an asset upon death."

The court also referred to the fact that the *Calmusky* decision has been the subject of some "critical comment".

As the court determined that the presumption of resulting trust did not apply to the beneficiary designation, the parties seeking to set aside the designation had the onus of establishing that the testator intended to benefit her estate, rather than her son who was named as beneficiary. Those parties were not able to meet that onus, and the court determined that the named beneficiary was entitled to the proceeds of the RRIF.

What is the Future of Beneficiary Designations and the Presumption of Resulting Trust?

Although many would argue that the outcome in *Mak Estate* is the correct one, because *Calmusky* was not appealed, we are, for lack of a better word, "stuck" with it. Both decisions were made by the Ontario Superior Court of Justice, and both purport to apply the principles in *Pecore*. As such, in the future, it is possible that the court could follow either precedent. We may have to wait, with bated breath, to see which decision is more consistently followed going forward before we can be comfortable with the current state of the law. In the circumstances, and until there is more certainty as to whether *Calmusky* will be applied going forward, it is advisable to take extra care in making beneficiary designations, such as executing additional documentation confirming the testator's intention in making such a designation.

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